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To: "FCC Mass Media Secretary (E-mail)" <MMBSecretary@fcc.gov>
Date: Sun, Feb 10, 2002 12:17 AM
Subject: Reply to Oppositions to Petition for Reconsideration of Report and Order, Docket 00-87

Reply to Oppositions to Petition for Reconsideration of Report and Order,
Docket 00-87

sent via Fed Ex, and email
February 9, 2002

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Muddy Broadcasting Company

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February 9, 2002

Magalie Salas, Secretary
Federal Communications Commission
Washington, D.C. 20554

RE: Reply to Oppositions to Petition for Reconsideration of Report and Order, Docket 00-87

Submitted by: private express package service and email

Transmitted herewith is the Muddy Broadcasting Company's Reply to Oppositions to a Petition for Reconsideration in the above referenced docket. Due to the uncertainties of delivery due to the anthrax situation, this document is also being submitted in its entirety by email to MMBSecretary@fcc.gov. Both documents are *completely identical*. Only one of them need be posted on the public record. According to the Office of Managing Director, FCC (2/8/02 revision), the Capitol Heights facility has now resumed receiving commercial overnight deliveries, such as Fed-Ex. This document was sent on this date, with delivery to Capitol Heights guaranteed for February 11, 2002.

Sincerely,



Thomas C. Holland
Muddy Broadcasting Company
2780 SW Talbot Rd.
Portland, OR 97201-1698

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON DC 20554**

IN THE MATTER OF:

**AMENDMENT OF SECTION 73.202(b)
TABLE OF ALLOTMENTS
FM BROADCAST STATIONS
(BRIGHTWOOD, MADRAS, BEND
AND PRINEVILLE OREGON)**

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**MM Docket No. 00-87
RM-9870
RM-9961**

TO: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**REPLY TO OPPOSITIONS TO PETITION FOR
RECONSIDERATION**

February 8, 2002

Muddy Broadcasting Company ("Muddy") hereby replies to Oppositions to Muddy's Petition for Reconsideration, which were filed by Madras Broadcasting ("Madras") and Hunt Broadcasting ("Hunt") on February 1, 2002.

Muddy's Petition for Reconsideration was based on 47 CFR §1.429(b)(1) in that "the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission," and/or §1.429(b)(2) "the facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity." Alternately, a third provision may justify a Petition for Reconsideration: §1.429(b)(3), which states "the Commission determines that consideration of the facts relied on is required in the public interest."

Madras contends in their Opposition that none of these provisions have been met. Muddy Broadcasting will demonstrate herein that they are wrong, on all three counts.

Hunt makes similar claims, and contends that they have standing in this matter due to their filing of a Proposed Rulemaking for Terrebonne, OR, which would be mutually exclusive with an allocation at

Madras on Channel 291C1. Muddy Broadcasting will refute both of these claims.

I. BACKGROUND

Muddy Broadcasting Company, an Oregon Corporation whose particulars are a matter of public record, filed a Petition for Rulemaking on March 16, 2000, to add Channel 251C3 to the FM Table of Allotments, for Brightwood, OR. This would be the first local service for Brightwood, and the only channel that could be allocated to Brightwood. Madras Broadcasting, an apparent phantom entity shielded by counsel, filed a counterproposal to instead allocate Ch 251C1 to Madras, OR. Muddy presented several alternative channels that could serve Madras, two of which - Ch 291 and 227 - could have C1 status. The Commission ruled in its October 26, 2001 Report and Order that the alternative site Muddy suggested for Ch 291C1 was too severely blocked by terrain to the community of Madras, and that Ch 227C1 introduced a new community too late in the process. Faced with only one channel deemed available, the Commission chose to allot it to Madras.

In its Petition for Reconsideration, Muddy correctly invoked the provisions of §1.429(b), in showing a *new* site for Ch 291C1 that could be allocated to Madras, without severe terrain blockage to the community. This new site only became available due to a class downgrade of KSTE-FM, Vancouver, WA, that occurred after the comment periods had in this instant proceeding had closed.

II. DISCUSSION

First, Muddy will first enumerate the facts that the parties appear to agree on:

1. Both Madras and Brightwood are communities deserving an allotment. This has never been in dispute, and the Commission has *repeatedly* stated its agreement.
2. Madras has a larger population within its identified municipal boundaries.
3. *If* there were only one usable channel, choosing Madras would be consistent with Commission policy.
4. The new site for Ch 291C1, as suggested by Muddy in its Petition for Reconsideration, would provide adequate line-of-sight to the community of Madras, and is not severely terrain blocked.

Neither Madras nor Hunt attempted to dispute this fact in their Oppositions, because they cannot. Measured by any means, Muddy's new Ch 291C1 site is no more terrain blocked than the allocation site for Ch 251C1 designated in the Report and Order, and already deemed acceptable in this regard by the Commission.

5. Section 307(b) of the Communications Act of 1934, as amended, directs that the "Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." The Commission has, on many occasions and whenever possible, sought to allocate channels to provide first local service to all deserving communities that are part of a Proposed Rulemaking docket.

We therefore are down to just one issue and one issue only - whether Muddy Broadcasting Company is being consistent with the Rules in proposing a new location for Ch 291C1 to serve Madras, at this stage in the proceeding. If Muddy can achieve this, an airtight case would exist that would strongly compel the Commission to allocate Ch 291C1 to Madras, and Ch 251C3 to Brightwood.

III. MADRAS BROADCASTING OPPOSITION

Madras Broadcasting made a number of factual errors and misrepresentations in its Opposition, and attempted to play them on both sides of the street. First, it contended that the facts had not changed since the last opportunity to present them had passed {§1.429(b)(1)}, since KSTE-FM was granted a Class C2 application on August 24, 2000, which would have been before Muddy's last opportunity to present this information had passed. What Madras neglected to say, is that the grant of a CP which includes a one-step class downgrade, does *not* mean that the higher class designation is immediately deleted from the Table of Allotments. Indeed, in one-step class downgrades as well as in minor-change applications, it continues to be Commission policy to protect the previously authorized facilities while the modified facilities are being built. The Commission has often rejected applications and PRMs that were conditioned on approved, but unbuilt facilities. This is because the Commission rightly recognizes that the

issuance of a CP does not insure that a facility will actually be built. The Commission's maintenance of KSTE's C1 status was properly continued long after the August 2000 grant of KSTE's C2 CP. It appears that this was *not* a database error.

As long as KSTE-FM maintained a C1 CP at their original C1 site (Mt. Scott - Happy Valley, OR), Muddy could not present its new Ch 291C1 site for Madras. KSTE-FM finished construction and filed an Application for Station License on April 12, 2001 - after Muddy's last opportunity to formally comment in the proceeding.

Madras Broadcasting's second error in its Opposition is contending that §1.429(b)(2) cannot apply. Madras contends that through the "exercise of ordinary diligence", Muddy should have known that KSTE-FM was issued a Class C2 CP. In fact, Muddy *did* know about the CP, and rightly knew that it could not act at that time. The facts which made the new Madras Ch 291C1 possible, were unknown until after the last opportunity to present them, since they *hadn't happened yet*. Muddy *did* exercise "ordinary diligence", and would have presented the new information had it occurred while the comment period was still open.

Madras Broadcasting's third error is contending that Muddy is not entitled to consideration under §1.429(b)(3), which permits consideration of new facts if they would serve the public interest. Certainly, providing first local service to two communities instead of one, if all requisite technical requirements can be met, is eminently in the public interest. Muddy is not trying to "parry" or unnecessarily delay the process as Madras accuses. Muddy has following the established procedures as set forth, in part, in Subpart C of Part 1 of the FCC Rules. It has presented the new information at its very first opportunity as provided for in the Rules.

Madras Broadcasting's fourth error was in impugning the FCC database. The FCC database is, directly or indirectly, the core source of vital information for the entire communications industry. The Mass Media database has progressed to the point where it is reasonably reliable. When suspected errors are discovered, they are reported to the Commission, which has been very responsive in recent years in promptly making the necessary corrections. Muddy Broadcasting did not question the presence of the C1 status of KSTE-FM after the issuance of its C2 CP, because the C1 entry remaining on the database was

consistent with normal FCC policy in such matters. Once again, Muddy Broadcasting acted with at least “normal diligence”, in not questioning the voracity of the database, in regards to this entry.

Attached is a current channel spacing study done at the new Ch 291C1 site for Madras, using the services of Dataworld (**Exhibit 1**). It shows that the Class C1 CP for KSTE-FM at Mt Scott, is now absent. Nothing remains to restrict a new 291C1 allocation for Madras at 44:49:12N; 120:38:57W, as Muddy has proposed. Dataworld is widely considered to maintain the most accurate private U.S. Mass Media database in the world.

Amazingly, after taking four pages arguing that the facts contained in the Muddy Broadcasting Petition for Reconsideration proposal were submitted too late, Madras contends on page five of its Opposition that Muddy submitted them prematurely! The reason given was that, at the time the Petition for Reconsideration was filed, KSTE-FM was not yet *licensed* as a C2 facility. This factor is superceded by the fact that KSTE-FM's original C1 Construction Permit (and all subsequent modifications) *expired on April 28, 2001*. Before this date, the Commission was obligated to continue to protect the C1 status, until and unless another facility was built and licensed. After this date, there was NO chance that KSTE-FM could build a C1 facility if they had not done so prior. Therefore, the Commission was justified in removing KSTE-FM's C1 status anytime after April 28, 2001. It properly did so, later that year. As was stated in Muddy's Petition for Reconsideration, October 18, 2000 was Muddy's last opportunity to comment in the proceeding, until the issuance of the Report and Order opened up the option of filing a Petition for Reconsideration. Indeed, after comments and replies are completed, §1.405(c) states “no additional pleadings may be filed unless specifically requested by the Commission or authorized by it.”

Also, KSTE-FM met the provisions of its CP and filed an application for station license on April 12, 2001. Normally, KSTE-FM would have been granted a formal license within several weeks. However, under the provisions of Docket 87-523 which originally added KSTE-FM's frequency, a frequency change for KLOO-FM, Corvallis, OR, was tied into KSTE-FM's authorization. KLOO-FM was required to be licensed to its new frequency of 292C, before KSTE-FM could receive its final license (on channel 290). KLOO-FM filed an application for station license on May 15, 2001, and was granted on January 30, 2002. Nothing now remains to impede the very rapid issuance of a final license for KSTE-

FM. The entire matter will be utterly moot very shortly, with the final issuance of KSTE-FM's C2 license.

III. HUNT BROADCASTING OPPOSITION

On January 24, 2002, Hunt Broadcasting filed a Petition for Rulemaking requesting a new allotment at Channel 293C2, at Terrebonne, OR. This would be mutually exclusive with Ch 291C1 at Madras. Muddy Broadcasting filed a valid Petition for Reconsideration on November 23, 2001. A Public notice in this regard was released by the FCC on January 10, 2002. Both of these events occurred prior to the Hunt Petition. Docket 00-87 is therefore still open, and the Hunt Petition must be rejected or held in abeyance until Docket 00-87 is finally resolved. Hunt's Opposition did not raise any new arguments, beyond those already discussed above.

It should be noted that there will shortly be at least one other equivalent channel available for allocation to Terrebonne - Ch 285C2. Indeed, unlike Ch 293C2, 285C2 can be allocated to Terrebonne without any site restriction away from the community, *or* allocated at the site requested by Hunt in its Proposed Rulemaking. This new allocation will be possible due to changes in KRSK, Mollala, OR (Ch286). KRSK has been granted a CP to relocate to a tower in Portland OR¹, and downgraded to a C1 (to protect KLYK, Longview, WA). KRSK subsequently applied to modify that CP to relocate to a different Portland tower², also as a C1. It is widely known that KRSK *fully intends* to construct at one of these two sites. If KRSK becomes licensed at the 2nd site, the allocation at Terrebonne could be *upgraded to a C1*.

IV. KSTE-FM APPLICATION OF 12/31/01

KSTE-FM has filed a new application to upgrade back to a Class C1 station, at their current location. This application was accepted for filing on December 31, 2001. KSTE-FM is seeking processing via the short-spacing provisions of §73.215, to protect KLYK, Longview, WA. Once again,

¹at 45:21:20N; 122:41:40W

²at 45:31:21N; 122:41:45W

Muddy Broadcasting's November 23, 2001 Petition for Reconsideration is "first in line", ahead of the KSTE-FM proposal. However, there would be no conflict anyway. KSTE-FM's transmitter site would be *fully spaced* to the new Ch 291C1 site for Madras. KSTE's proposed theoretical fully spaced allotment coordinates of 45:27:08N; 122:32:47W would be slightly short spaced to the new Madras Ch 291C1 site. However there are theoretical fully spaced allotments sites nearby (i.e.: 45:29:45N: 122:41:00W) that would meet *all* spacing requirements, including to the new Madras 291C1 site. If deemed necessary, it is fully within the Commission's prerogative to specify different theoretical fully spaced allotment coordinates for KSTE-FM.

V. CONCLUSIONS

Throughout this proceeding Muddy Broadcasting Company has proceeded with honesty, transparency, and with no hidden agendas. Muddy has demonstrated that it meets the requisite requirements to have its Petition for Reconsideration be given serious deliberation. Muddy has demonstrated that there is now a site that unquestionably would provide adequate line-of-site coverage to Madras on Channel 291C1. Neither Madras nor Hunt have even attempted to dispute this fact. Muddy has demonstrated that it presented this new site at the proper time in the proceeding, given all the circumstances.

Since this is anticipated to be the very last filing in this proceeding, Muddy Broadcasting would like to thank the Commission for its patient work in this proceeding. Muddy trusts that the Commission will make the proper decision in the public interest by reconsidering the Report and Order and allotting Ch 291C1 to Madras, and Ch 251C3 to Brightwood, OR.

EXHIBIT 1 - DATAWORLD SPACING STUDY

Saturday, February 09, 2002

Dataworld FM Spacing Study

Title: MADRAS NEW SITE

Channel: 291 C1 (106.1 MHz)
Database: DW 2/7/2002 6:02:39 PM

Latitude: N 44° 49' 12.0"
Longitude: W 120° 38' 57.0"
Safety Zone: 65.0 km

Call City of License	Auth	Licensee name St	FCC File Number	Chan Freq	HAAT(m) HMSL(m)	ERP (kW)	Latitude Longitude	Br-to -from	Dist (km)	Req (km)
KUJZ Creswell	Lic	Cumulus Licensing Corporation OR	BLH-19920331KC	237 C3 95.3	367.9 567.8	0.62 H 0.62 V	N 44° 00' 04.0" W 123° 06' 45.0"	245.9 64.2	216.3 192.3	24.00 CLEAR
KXJM Portland	Lic	Rose City Radio Corporation OR	BLH-19981023KC	238 C 95.5	386.0 480.0	100 H 100 V	N 45° 29' 20.0" W 122° 41' 40.0"	295.6 114.2	177.2 136.2	41.00 CLEAR
License granted 1/28/98 per 44421-2/3/99;										
KCGB-FM Hood River	Lic	Columbia Gorge Broadcasters, Inc OR	BLH-781124AB	288 A 105.5	-140.2 200.9	3 H 3 V	N 45° 42' 06.9" W 121° 32' 10.0"	325.0 144.4	120.2 45.22	75.00 CLEAR
KQAK Bend	Lic	Horizon Broadcasting Group, LLC OR	BMLH-20010522AAO	289 C1 105.7	180.0 1318.0	40 H 40 V	N 44° 04' 40.0" W 121° 19' 49.0"	213.5 33.0	98.70 16.70	82.00 CLEAR
License modification granted 8/21/2001 per 45056-8/24/2001;										
KSTE-FM Vancouver	App	Citicasters Licenses, Inc. (2) WA	BPH-20011228AAS	290 C1 105.9	470.0 501.0	21 H 21 V	N 45° 31' 21.0" W 122° 44' 45.0"	296.2 114.7	182.4 5.382	177.0 CLOSE
KBET-FM changed to KSTE-FM 2/13/01 per List #400 (3/1/01);										
KSTE-FM Vancouver	CP	Citicasters Licenses, Inc. (2) WA	BMPH-20000530ACA	290 C2 105.9	470.0 561.0	4.1 H 4.1 V	N 45° 31' 21.0" W 122° 44' 45.0"	296.2 114.7	182.4 24.38	158.0 CLEAR
KBET-FM changed to KSTE-FM 2/13/01 per List #400 (3/1/01); From class C1;										
KLOO-FM Corvallis	Lic	Citicasters Licenses, Inc. (1) OR	BLH-19810511AL	291 C 106.1	347.0 500.0	100 H 100 V	N 44° 38' 45.0" W 123° 16' 13.0"	265.6 83.7	208.5 -61.5	270.0 SHORT
KBKS Tacoma	Lic	Infinity Radio of Washington Lic WA	BLH-20001023AFA	291 C 106.1	698.0 932.0	68 H 68 V	N 47° 30' 17.0" W 121° 58' 04.0"	341.7 160.7	315.3 45.32	270.0 CLEAR
License granted 1/31/2001 per 44917-2/7/2001;										
KBNH Homedale	CP	R & S Media ID	BMPH-20000229ABO	292 C 106.3	313.0 1300.0	97.75 H 97.75 V	N 43° 37' 15.0" W 117° 12' 35.0"	114.7 297.1	305.4 96.45	209.0 CLEAR
CP granted 3/30/2001 per 44956-4/4/2001;										

>> End of channel 291 C1 study <<

NOTE: KLOO-FM at 291C is completely moot. KLOO-FM is now *licensed* at 292C, per MM Docket 87-523

I certify that the material contained herein is true, to the best of my knowledge and ability.

MUDDY BROADCASTING COMPANY

by

A handwritten signature in black ink, appearing to read 'TCH', written over a horizontal line.

Thomas C. Holland, Secretary/Treasurer
Muddy Broadcasting Company

Muddy Broadcasting Company
Attn: Thomas C. Holland
2780 SW Talbot Rd.
Portland, Oregon 97201-1698
Thomas C. Holland,

CERTIFICATE OF SERVICE

I Betty J. McArdle

hereby certify that copies of the foregoing "Reply to Oppositions to Petition for Reconsideration", MM Docket No. 00-87, were sent via First Class U.S. Mail, postage prepaid, on this 9th day of February, 2002, to the following:

Madras Broadcasting
Lee J. Peltzman, Esq
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1850 M Street N.W.
Washington, D.C. 20036

Hunt Broadcasting, Inc.
Scott C. Cinnamon, Esq
Shook, Hardy, & Bacon LLP
600 14th St. NW #800
Washington, D.C. 20005



note: Mr. Cinnamon neglected to include his address in his pleading.
This address is the most recent information available

signed:

Betty J. McArdle